MUHAMMAD AZHAR MOHAMAD ARSAD & ANOR v. MANZOR HUSSAIN SHAH WILAYAT SHAH (SUING AS ADMINISTRATOR OF THE ESTATE OF SHAH FARIN MANZOR HUSSAIN SHAH, DECEASED)

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG JC
[CIVIL APPEAL NO: 11B-36-06-2015]
5 NOVEMBER 2015

TORT: *Damages – Quantum – Road accident – Liability apportioned at 90% against appellants – Respondent awarded general damages of RM20,000 and special damages of RM100 – Whether award of damages excessive – Whether there was failure to take into consideration deceased passed away seven months after accident – Whether quantum of award should be reduced*

On 3 September 2009, the first appellant whilst riding a motorcycle owned by the second appellant, collided with the motorcycle ridden by the deceased. As a consequence of the accident, the deceased suffered fractures to his fingers and feet as well as multiple abrasions for which he received medical treatment. The deceased however passed away on 10 April 2010 but not because of the injuries sustained from the accident. The respondent brought a claim on behalf of the estate of the deceased. At the trial before the Magistrate, the parties agreed that liability be apportioned at 90% against the appellants and awarded the respondent general damages of RM20,000 and special damages of RM100 (assessed at 100% liability) together with interests and costs. Dissatisfied with the quantum of damages awarded, the appellants appealed. The sole contention of the appellants was that the Magistrate's award of damages was excessive because she failed to take into consideration that the deceased had passed away seven months after the accident. The appellants thus submitted that the Magistrate had failed to make an appropriate adjustment by reducing the quantum claimed and the appellants proposed an 80% reduction.

Held (dismissing appeal):

(1) Any adjustment is invariably fact sensitive and dependent on the circumstances of the case. On the facts herein, from the medical report of the deceased by Dr Wong Chee Leng ('Dr Wong'), a consultant orthopaedic surgeon of Pantai Hospital Penang who treated him, the deceased had undergone surgery for the fractures on 3 September 2009. He was thereafter discharged on 7 September 2009. On further examination on 30 November 2009, there was only residual stiffness over the fingers. There was however no evidence adduced on the medical condition of the deceased near the time of his death on 10 April 2010. The residual stiffness over his fingers might have fully recovered but in any event, the burden of proof to the contrary lay on the

A appellants. There was also no evidence led on it at the trial including the calling of Dr Wong to explain the nature and more importantly, the continuing effect particularly the anticipated duration of the stiffness. (paras 12 & 13)

B **(2)** The deceased had already endured the pain and suffering caused by the road accident at all material times. He was conscious post the accident as gathered from his police report. Subsequently, he had undergone surgery and was subjected to post surgical pain till recovery. This could obviously be contrasted with the facts in *Mohd Nor Yahaya* and *Ganesan a/l Suppiah @ Muniandy* cited by the appellants wherein the victim C survived for only two and a half months and eight days respectively. Accordingly, there was no justification to take into account the demise of the deceased and reduce the quantum of the award. (paras 14 & 15)

Case(s) referred to:

D *Ganesan a/l Suppiah @ Muniandy (mendakwa sebagai anak dan penjaga yang sah kepada Suppiah @ Munandy a/l Arumugam (si mati) v. Lim Zi Siang & Anor [2013] 2 PIR [46]* ***(dist)***

Mohd Nor bin Yahaya (menyaman bagi pihak sendiri dan sebagai pentadbir harta pesaka Nur Hanani binti Ahmad) v. Abdul Aziz Bin Othman & Anor [2014] 2 PIR [129] ***(dist)***

E *Moo Ah Kow v. TNB Distribution Sdn Bhd & Another Case [2009] 1 LNS 1472 HC* ***(refd)***

Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***

For the appellants - Farhana Mohd Jabarullah; M/s Imavathi & Co
For the respondent - Syamsul Adzha Hassan; M/s Haniff & Partners

F *[Appeal from Magistrate's Court; Civil Suit No: A73KJ-449-12-2014]*

Reported by Suhainah Wahiduddin

JUDGMENT

G **Lim Chong Fong JC:**

Introduction

[1] This is an appeal from the trial decision of the Balik Pulau Magistrate Court in relation to a motor vehicle road accident.

H **[2]** The respondent/plaintiff brought the claim on behalf of the estate of Shah Farin bin Manzor Hussain Shah, deceased. On 3 September 2009, the first defendant whilst riding motorcycle bearing Registration No. PCS 3790 owned by the second defendant collided with the motorcycle ridden by the deceased bearing Registration No. PHV 407 along Jalan Baru, Batu Maung, I Penang.

[3] As a consequence to the road accident, the deceased suffered fractures to his fingers and feet as well as multiple abrasions. He received medical treatment. The deceased however passed away on 10 April 2010 not as the result of injury sustained from the road accident.

[4] At the trial before the learned Magistrate, the parties agreed that liability be apportioned at 90% against the appellants. The learned Magistrate awarded the respondent general damages of RM20,000 and special damages of RM100 (assessed at 100% liability) together with interest and costs.

[5] The appellants were dissatisfied with the quantum of the damages awarded and appealed to the High Court on 20 May 2015. I heard the appeal on 15 October 2015 and dismissed it with costs of RM1,000 after hearing counsel. Accordingly I provide my grounds thereto herein below.

Contentions Of The Parties

[6] The sole contention of the appellants is that the learned Magistrate's award of damages is excessive because she failed to take into consideration that the deceased passed away seven months after the accident. Hence she failed to make an appropriate adjustment by reducing the quantum claimed and the appellants proposed a 80% reduction.

[7] The appellants referred to the cases of *Mohd Nor bin Yahaya (menyaman bagi pihak sendiri dan sebagai pentadbir harta pesaka Nur Hanani binti Ahmad) v. Abdul Aziz Bin Othman & Anor* [2014] 2 PIR [129] sc and *Ganesan a/l Suppiah @ Muniandy (mendakwa sebagai anak dan penjaga yang sah kepada Suppiah @ Munandy a/l Arumugam (si mati) v. Lim Zi Siang & Anor* [2013] 2 PIR [46] sc in support of their contention.

[8] The respondent rebutted that the quantum awarded by the learned Magistrate is proper and fair. No adjustment is needed to be made by reason that the deceased had recovered save for some stiffness of the fingers by the time he passed away.

Findings Of The Court

[9] For appeals on quantum, the *dicta* of Azmi CJ (Malaya) in *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 is instructive. His Lordship held as follows:

> The difficulty of laying down the principles on which damages are awarded has frequently been recognised. However, as Lindley LJ in *Rodocanachi Mibburn Brothers* (1887) 18 QBD 67 78 stated:
>
> > It must be remembered that the rules as to damages can in a nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries.

A Or another way of putting it - that it is a matter of assessment but not of calculation. So far as this court is concerned we should, to paraphrase Greer LJ in *Flint Levell* [1935] 1 KB 354 360 be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that
B he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case.
C

[10] I have reviewed the grounds of judgment of the learned Magistrate and she was of the view the proposed 80% reduction by the appellants is irrelevant for her consideration because the deceased passed away a year after the road accident occurred.

D **[11]** In *Moo Ah Kow v. TNB Distribution Sdn Bhd & Another Case* [2009] 1 LNS 1472, Harminder Singh Dhaliwal J held as follows:

Now, if he had survived, there would be no question of the deceased getting the full amount of general damages. This would be in the region of RM160,000.00 on 100% liability. But sadly, he managed to survive for
E only one month. So the question is - can there be an award for damages for pain and suffering in such a case, and if so, how is the amount of damages to be ascertained?

In *Thangavelu v. Chia Kok Bin* [1981] CLJ 281 (Rep); [1981] CLJ 132; [1981] 2 MLJ 277, a 13 year-old boy suffered serious head injuries in a road
F accident. He was in a state of coma responding to deep pain only until he died some 11 months later. The High Court awarded a sum of RM20,000.00 for pain and suffering even though the boy in that case suffered little pain due to his limited state of unconsciousness.

In *Kuan Kum @ Lain Kuan Kam @ Lai Wai Chuen (as administrators of the estate of Muk Choon Loy, deceased) v. Vincent Ang Kek Liang & Anor*, Mallal's
G Digest Vol. 6 Para 1705, a 55 year-old man suffered serious injuries resulting in tetraplegia. He succumbed to his injuries seven month after the accident. The Sessions Court awarded RM50,000.00 as general damages for pain and suffering.

In *Mariah bte Mohamad (Administratix of the estate of Wan Salleh bin Wan*
H *Ibrahim, deceased) v. Abdullah bin Daud (Dr Lim Kok Eng & Anor, Third Parties)* [1989] 2 CLJ 95 (Rep); [1989] 2 CLJ 1232; [1990] 1 MLJ 240, the deceased suffered serious head injuries and died 5 months and 18 days after the accident. The High awarded RM15,000.00 as general damages for pain and suffering.

I In *Maimunah bte Hassan (sebagai wakil harta pusaka Rozita bte Khamis) dan satu lagi v. Marimuthu s/o Samanathan & satu lagi* [1993] 1 CLJ 119, an 8 month-old baby died some 3 months after suffering severe head injuries

in a road accident. The High Court awarded RM25,000.00 as general damages for pain and suffering.

On my part I would think that firstly, damages for pain and suffering can be awarded if there was sufficient consciousness on the part of the deceased prior to death. The level of consciousness is relevant to indicate the level of suffering that the deceased will have had to endure. If there was a low level of consciousness or none at all, then only a modest sum should be allowed. Secondly, on the question of quantum, this will depend also on the length of time that the deceased survived and the gravity of the pain endured. There cannot be any fixed formula as each case will have its own peculiar facts and circumstances relating to the pain and suffering endured prior to death … (emphasis added)

[12] It seems to me that any adjustment is invariably fact sensitive and dependent on the circumstances of the case. On the facts herein it is clear from the medical report of the deceased by Dr Wong Chee Leng, a consultant orthopaedic surgeon of Pantai Hospital Penang who treated him that the deceased had undergone surgery for the fractures on 3 September 2009. He was thereafter discharged on 7 September 2009. On further examination by Dr Wong on 30 November 2009, there was only residual stiffness over the fingers.

[13] There is however no evidence adduced on the medical condition of the deceased near the time of his death on 10 April 2010. The residual stiffness over his fingers might in my view have fully recovered but in any event, the burden of proof to the contrary lie on the appellants. There was also no evidence led on it at the trial including the calling of Dr Wong to explain the nature and more importantly, the continuing effect particularly the anticipated duration of the stiffness.

[14] I can therefore safely conclude that the deceased had already endured the pain and suffering caused by the road accident at all material times. He was conscious post the accident as gathered from his police report. Subsequently he has undergone surgery and subjected to post surgical pain till recovery. This can obviously be contrasted with the facts in *Mohd Nor bin Yahaya supra* and *Ganesan a/l Suppiah @ Muniandy supra* cited by the appellants wherein the victim survived for only 2 1/2 months and 8 days respectively.

[15] Accordingly, I see no justification to take into account the demise of the deceased and reduce the quantum of the award.

Conclusion

[16] For the foregoing reasons, I find that there is no merit in the appeal and therefore dismissed the appeal as so ordered.